

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

WHEELABRATOR BALTIMORE, L.P. et al.,

Plaintiffs,

v.

Civil Action No. 1:19-cv-01264

MAYOR AND CITY COUNCIL OF
BALTIMORE,

Defendants.

**Brief Amicus Curiae of the
LOCAL GOVERNMENT COALITION FOR RENEWABLE ENERGY
in support of
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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TABLE OF AUTHORITIES

Cases

<i>Department of Commerce v. New York</i> , 139 S.Ct. 2551 (2019).....	3
<i>United States v. Stanchich</i> , 550 F.2d 729 (2d Cir. 1985).....	3

Statutes

40 C.F.R. § 60.54b	5
40 C.F.R. § 60.58b	5
42 U.S.C. § 7429	4
42 U.S.C. § 7429(a)(2).....	4

Other Authorities

79 Fed. Reg. 41772	9
79 Fed. Reg. at 41774	9, 10
80 Fed. Reg. 52100	8
80 Fed. Reg. at 52105	10
80 Fed. Reg. at 52109	9

Other Sources

C.S. Psomopoulos, A. Bourka and N.J. Themelis, <i>Waste-to-Energy: A review of the status and benefits in USA</i> , Waste Management (2009).....	6, 8
Confederation of European Waste-to-Energy Plants (CEWEP), Municipal waste treatment in 2017	11
Earth Engineering Center and Urban Habitat Project, Columbia University, <i>Life After Fresh Kills: Policy, Technical and Environmental Considerations</i> , (2001).....	7, 10
Eileen Brettler Berenyi, Ph.D, <i>A Compatibility Study: Recycling and Waste-to-Energy Work in Concert</i> (May 2014)	11
Elisabeth Rosenthal, <i>Europe Finds Clean Energy in Trash, but U.S. Lags</i> , N.Y. Times, April 12, 2010	3, 6, 11
Environmental Protection Agency, <i>International Toxicity Equivalency Factor (I-TEF) Method of Risk Assessment for Complex Mixtures of Dioxins and Related Compounds</i> (1988).....	5
Intergovernmental Panel on Climate Change (IPCC), Assessment Report 5 (2014)	10
Joint Institute for Strategic Energy Analysis, <i>Waste Not, Want Not: Analyzing the Economic and Environmental Viability of Waste-to-Energy (WTE) Technology for Site-Specific Optimization of Renewable Energy Options</i> , (February 2013)	7
Lib Solomon, <i>Wheelabrator Sues Baltimore County For Not Sending Enough Trash to Its Incinerator</i> , Baltimore Sun, April 12, 2019	3
Marco J. Castaldi, Ph.D., <i>Waste to Energy: the future of waste disposal?</i> , March 29, 2018.....	6, 8
Matt Kasper, <i>Energy from Waste Can Help Curb Greenhouse Gas Emissions</i> , Center For American Progress, April 17, 2013	11
P. Ozge Kaplan, Joseph Decarolis, and Susan Thorneloe, <i>Is it Better to Burn or Bury for Clean Electricity Generation?</i> (2008)	7, 10

UNFCCC/CCNUCC, <i>Approved Baseline and Monitoring Methodology AM0025</i>	10
United Nations Environment Programme (UNEP), <i>Bridging the Emissions Gap</i> , (November 2011)	10
Walt Stevenson, Memorandum to Docket A-90-45, <i>Large MWC's re Emission from Large MWC Units at MACT Complaint</i> (June 2002).....	6
World Economic Forum, <i>Green Investing - Towards a Clean Energy Infrastructure</i> (January 2009)	2

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This brief *amicus curiae* is submitted by the Local Government Coalition for Renewable Energy in support of the Plaintiffs and their position that the ordinance at issue here, City of Baltimore Ordinance 18-0306, is preempted by the federal Clean Air Act as well as parallel Maryland laws.¹

Waste management, including, and of particular importance here, management of municipal solid waste (MSW), is an essential responsibility of all societies, and waste-to-energy (WTE) facilities such as the Wheelabrator WTE facility at issue in this litigation, are an

¹ *Amici* are an unincorporated coalition that participates in a variety of state and federal forums (rulemaking proceedings, legislative hearings, and trial and appellate court proceedings). *Amici* consist of the following entities: City of Ames (IA), Ecomaine (ME), City and County of Honolulu (HI), Kent County (MI), Lancaster County Solid Waste Management Authority (PA), Lee County (FL), Marion County (OR), Solid Waste Authority of Palm Beach County (FL), Solid Waste Disposal Authority of the City of Huntsville (AL), Spokane Regional Solid Waste Authority (WA), and the York County Solid Waste and Refuse Authority (PA).

environmentally first-rate means for managing non-recycled MSW. That is the context in which *amici* – cities, counties and special authorities that have primary responsibility for managing the MSW generated in their respective communities – developed modern WTE facilities for management of their communities’ waste. *Amici*’s decisions to develop WTE facilities are the result of careful, painstaking assessment of the alternatives and recognition that WTE is one of the most environmentally protective alternatives for managing municipal solid waste while at the same time providing reliable renewable energy. These statements are not mere hyperbole or braggadocio. To the contrary, the U.S. Environmental Protection Agency (EPA) has recognized WTE as a significant source of renewable energy that has “less environmental impact than almost any other source of electricity,” see <http://energyrecoverycouncil.org/wp-content/uploads/2016/07/030214-EPA-letter.pdf>, and similarly the World Economic Forum’s report, *Green Investing – Towards a Clean Energy Infrastructure*, recognizes WTE as one of eight “key renewable energy sectors” that is “particularly promising in terms of . . . abatement potential” for carbon (greenhouse gas) emissions. https://www.wtienergy.com/sites/default/files/ERC-2009_GreenInvesting_Jan_Davos_report.pdf, p. 27.²

Baltimore’s Ordinance 18-0306 (Ordinance) cannot be reconciled with the facts and science pertinent to WTE or the comprehensive federal-state regulatory system that governs WTE facilities. To be sure, the ostensible purpose of the ordinance, as Baltimore representatives have at times contended, is additional regulation of air emissions from Wheelabrator Baltimore’s WTE facility and the Curtis Bay medical waste incinerator. That said, Baltimore’s vision for the

² The World Economic Forum is an international nonprofit organization for public-private cooperation. The Forum was incorporated in 1971 and is headquartered in Geneva, Switzerland. The Forum is dedicated to improving global well-being through engagement of stakeholders from business, government and academia. See generally <https://www.weforum.org/about/world-economic-forum>.

regulatory regime it proposes is at odds with the demanding EPA and Maryland Department of the Environment regulatory standards already in place. Moreover, Baltimore’s contentions regarding the regulatory scheme it proposes are most aptly described as “contrived reasons,” *see Department of Commerce v. New York*, 139 S.Ct. 2551, 2576 (2019), and cannot conceal the fact that the true purpose of Ordinance 18-0306 is not to address an environmental concern but rather – in the words of the proponents of the ordinance – “to shut down Wheelabrator,” specifically, the WTE facility in Baltimore. *See Baltimore Sun*, April 12, 2019, *Wheelabrator Sues Baltimore County For Not Sending Enough Trash to Its Incinerator*, <https://www.baltimoresun.com/maryland/baltimore-county/ph-tt-wheelabrator-0417-story.html>. The anti-WTE position that underlies Ordinance 18-0306 cannot be reconciled with the facts and science documenting WTE’s excellent environmental benefits.³ And while Baltimore’s strategy in this litigation may include an attempt to retreat from the City’s earlier statement that the purpose of Ordinance 18-0306 is “to shut down Wheelabrator,” a reviewing court must be wary of such a change of heart and is “not required to exhibit a naivete from which ordinary citizens are free.” *Department of Commerce* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 729, 744 (2d Cir. 1985)).

In the face of WTE’s considerable environmental benefits, as well as comprehensive WTE regulation under the federal Clean Air Act and other statutes, together with local governments’ massive investments in WTE technology, the additional regulatory scheme the Ordinance proposes would truly be counterproductive. While Baltimore’s acknowledgment of the true purpose of Ordinance 18-0306, i.e., “to shut down Wheelabrator,” is in and of itself powerful evidence of the

³ Recognition of WTE’s benefits is not at all unique to the U.S. *See, e.g., Europe Finds Clean Energy in Trash, but U.S. Lags*, Elisabeth Rosenthal, *The New York Times*, April 12, 2010, <https://www.nytimes.com/2010/04/13/science/earth/13trash.html> (describing experience in Denmark where “communities vie to have [WTE plants] built” in their neighborhoods. *See n. 13, infra* (noting that Denmark relies on WTE to process 53 percent of its MSW)).

ordinance's illegality, on a number of independent bases the City's action is unlawful under both federal and Maryland law. That illegality is thoroughly demonstrated in the Plaintiffs' summary judgment memorandum, and *amici* will not repeat that legal analysis. Instead, we focus below on the facts and science pertinent to WTE.

ARGUMENT

Waste-to-energy facilities provide a diverse set of increasingly important environmental benefits to the communities they serve as well as the nation at large. This ranges from significant reductions in greenhouse gases to facilitating enhanced recycling in the communities the WTE facilities serve.

A. WTE Facilities Enhance Environmental Protection

WTE facilities operate under stringent federal and state air quality standards based on the most advanced emissions control technology. The predicate for these standards is section 129 of the Clean Air Act, 42 U.S.C. § 7429. The statute requires WTE facilities to achieve “the maximum degree of reduction in emissions [MDRE]. . . that [EPA] . . . determines is achievable” for nine specified air pollutants. *See* 42 U.S.C. § 7429(a)(2) (as an alternative to the acronym “MDRE,” EPA uses the term “Maximum Achievable Control Technology” or “MACT” to describe the section 129 standards).⁴ In establishing and revising the MACT standards, EPA must consider cost, non-air quality health and environmental impacts and energy requirements. For new WTE facilities, MACT can be no less stringent than the level of emissions control “achieved in practice by the best controlled similar unit.” For existing WTE facilities, such as Wheelabrator Baltimore,

⁴ The nine pollutants are particulate matter, sulfur dioxide, hydrogen chloride, nitrogen oxides, carbon monoxide, lead, cadmium, mercury, and dioxins-furans. An additional (or tenth) category is opacity, which is not a separate pollutant but rather a byproduct of certain air pollutants including (as an example) nitrogen oxides.

MACT requires the level of emissions control achieved by averaging the “best performing 12 percent of units in the same category.” To assure compliance with the MACT standards, EPA’s regulations implementing section 129 include detailed requirements for compliance and performance testing together with comprehensive emissions reporting and recordkeeping and operator training standards. *See, e.g.*, 40 C.F.R. §§ 60.54b and 60.58b. The Wheelabrator Baltimore facility is subject to each of these regulations, which are incorporated into the facility’s Clean Air Act operating permit under Title V of the Act.

As EPA has emphasized, the level of emissions control achieved by modern WTE facilities “has been outstanding,” with emission reductions for various pollutants in the 96-99 percent range following implementation of MACT standards in the early 1990’s together with subsequent increases in the stringency of the MACT standards. An EPA memorandum addresses this point as follows:

The performance of the MACT retrofits has been outstanding. *** Of particular interest are dioxin/furan and mercury emissions. Since 1990 (pre-MACT conditions), dioxin/furan emissions from large and small MWCs [i.e., WTE facilities] have been reduced by more than 99 percent, and mercury emissions have been reduced by more than 96 percent. Dioxin/furan emissions have been reduced to 15 grams per year and mercury emissions reduced to 2.3 tons/year.

See <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0117-0164>.⁵

⁵ The dioxin/furan emissions noted above are in grams per year of the toxicity equivalent quantity (TEQ) using 1989 North Atlantic Treaty Organization (NATO) toxicity factors. *See* <https://nepis.epa.gov/Exe/ZyNET.exe/94X00EFE.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1986+Thru+1990&Docs=&Query=&Time=&EndTime=&SearchMethod=1&To cRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&Int QFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C86thru90%5CTxt%5C00000035%5C94X00EFE.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>.

The significant WTE emission reductions that have been achieved are perhaps best demonstrated by comparing the figures in the preceding quotation with earlier emission levels. For example, pre-1990 annual WTE dioxins/furans emissions in the U.S. were 4,400 grams, but those emissions were subsequently reduced to 15 grams per year by 2005.⁶ Annual WTE dioxin emissions in the U.S. today are so low that 120 years of WTE dioxin emissions are equal to the dioxin exposure from attending a fireworks exhibit for 15 minutes. *See Waste to Energy: the future of waste disposal?* https://www.gsblaw.com/assets/htmldocuments/pdfs/DSNY_Inch_lrn_wkshp.pdf, slide 23 (after October 1, 2019 the preceding document will be accessible at https://www.foster.com/assets/htmldocuments/pdfs/DSNY_Inch_lrn_wkshp.pdf). Similarly, pre-1990 annual WTE emissions of mercury in the U.S. were 57 tons, which was reduced to only 2.3 tons by 2005. <https://beta.regulations.gov/document/EPA-HQ-OAR-2003-0072-0048>. These very strong environmental protection measures did not occur in a vacuum, and instead reflect increasingly stringent state and federal requirements for the most advanced emissions control technology. This is the context in which the National Renewable Energy Laboratory describes EPA's emission standards for WTE facilities as "the most stringent in the world." *Waste Not, Want Not: Analyzing the Economic and Environmental Viability of Waste-to-Energy (WTE)*

⁶ Another analysis published at about the same time as the EPA analysis referred to above indicates that following implementation of MACT, WTE dioxin emissions in the U.S. decreased by a factor of 1,000 to less than 12 grams. *Waste-to-energy: A Review of the Status and Benefits in the USA* http://ccnyeec.org/wp-content/uploads/2019/08/psomopoulos_themelis_WTE_review.pdf, p. 1722; *see also Europe Finds Clean Energy in Trash, infra, The New York Times*, April 12, 2010, (WTE facilities "run so cleanly that many times more dioxin is now released from home fireplaces and backyard barbecues than from incinerators").

Technology for Site-Specific Optimization of Renewable Energy Options, NREL/TP-6A50-52829, p. 2, February 2013, <http://www.nrel.gov/docs/fy13osti/52829.pdf>.

In addition, EPA’s analysis shows that WTE yields considerably better results – compared to landfills – in terms of maximum energy recovery and lowest GHG and criteria pollutant emissions. *Is it Better to Burn or Bury for Clean Electricity Generation?* pp. 1711-14, 1716-17, <http://pubs.acs.org/doi/pdf/10.1021/es802395e> (hereafter “*Better to Burn or Bury*”).⁷ In fact, WTE emissions are lower than landfill emissions for effectively each of the 10 major air pollutants evaluated. *Life After Fresh Kills: Policy, Technical and Environmental Considerations*, Part B, Summary and p. B-30. <http://www.seas.columbia.edu/earth/EECSIPA-report-NYC-Dec11.pdf> (hereafter “*Life After Fresh Kills*”).⁸

WTE’s efficiency and reliability are clear as well. In that regard, WTE recovers approximately 600 kilowatt hours (kWh) of electricity per ton of waste processed, which is approximately 10 times the electric energy recoverable from a ton of landfilled waste. *Better to Burn or Bury*, *supra*, p. 1714; *see also Life After Fresh Kills*, *supra*, p. B-29. In addition, WTE is the paradigm example of distributed, baseload generation that serves nearby load without the need for new long-distance transmission lines (i.e., the source of electric power is in close proximity to its users). In addition, WTE facilities are available at all times (24 hours a day and 7 days each

⁷ “Criteria pollutants” are six common air pollutants – carbon monoxide, particulate matter, sulfur dioxide, lead, ground level ozone and nitrogen oxides – for which the Clean Air Act requires EPA to establish National Ambient Air Quality Standards (NAAQS). Five of the six criteria pollutants are included in the ten pollutants regulated under EPA’s MACT standards for WTE facilities. The only exception is ozone, which is regulated for WTE facilities through emission controls on other pollutants, including nitrogen oxides.

⁸ One of the ten pollutants, carbon dioxide, is emitted by WTE facilities but not landfills. Landfills, on the other hand, emit very large quantities of methane, which is one of the most potent greenhouse gases, and the time-integrated greenhouse gas impact of landfill methane is as much as 45 times greater than the greenhouse gas impact of WTE. *Life After Fresh Kills*, p. B-30.

week) and are unaffected by days that are cloudy or calm. In fact, an analysis prepared for the New York City Department of Sanitation by the Earth Engineering Center at the City College of New York examined nine distinct energy sources (nuclear, WTE, coal, landfill gas, biomass, natural gas combined cycle, thermal solar, wind, and photovoltaic solar), and determined that WTE's reliability is second only to nuclear power. Waste to Energy: the future of waste disposal? Waste to Energy: the future of waste disposal? https://www.gsblaw.com/assets/htmldocuments/pdfs/DSNY_Inch_lrn_wkshp.pdf, slide 21 (after October 1, 2019 the preceding document will be accessible at https://www.foster.com/assets/htmldocuments/pdfs/DSNY_Inch_lrn_wkshp.pdf).

It should also be noted that unlike landfills, WTE facilities “do not have a continuing cost in land.” See http://www.wasatchintegrated.org/wp-content/uploads/2016/07/Waste_To_Energy-A_Review_of_the_Status_and_Benefits_in_the_USA.pdf, p. 1721. Thus, compared to a landfill, a WTE facility has a very modest – in fact, miniscule – footprint, not to mention the fact that reuse of the vast acreage that becomes a landfill is severely restricted.

B. WTE Mitigates Climate Change

WTE technology helps to mitigate climate change, and WTE's role in reducing greenhouse gas (GHG) emissions is widely recognized. Important context here is the fact that one of the most potent greenhouse gases is methane, and landfilling, which as a practical matter is the only alternative to WTE for management of post-recycling MSW, is a major source of methane – the United States' third largest source. *Emission Guidelines, and Compliance Times, and Standards of Performance for Municipal Solid Waste Landfills; Proposed Rules*, 80 Fed. Reg. 52100, 52123/2 (August 27, 2015) (hereafter “*Proposed Landfill Emission Guidelines*”). In fact, EPA estimates that landfills are the source of 18.1 percent of total U.S. methane emissions. See

Emission Guidelines, and Compliance Times, and Standards of Performance for Municipal Solid Waste Landfills; Advance Notice of Proposed Rulemaking (ANPRM), 79 Fed. Reg. 41772, 41774/3 (July 17, 2014) (hereafter “*Landfill Emissions ANPRM*”). EPA further addresses this matter as follows:

Methane is a precursor to ground-level ozone, a health-harmful air pollutant. Additionally, ozone is a short-lived climate forcer that contributes to global warming. In remote areas, methane is a dominant precursor to tropospheric ozone formation. Approximately 50 percent of the global annual mean ozone increase since preindustrial times is believed to be due to anthropogenic methane. Projections of future emissions also indicate that methane is likely to be a key contributor to ozone concentrations in the future. Unlike nitrogen oxide (NO_x) and VOC [Volatile Organic Compounds], which affect ozone concentrations regionally and at hourly time scales, methane emissions affect ozone concentrations globally and on decadal time scales given methane’s relatively long atmospheric lifetime compared to these other ozone precursors.

Proposed Landfill Emission Guidelines, 80 Fed. Reg. at 52109/2 (internal citations omitted). In addition, there is widespread recognition that “because of its potency as a GHG and its [longer] atmospheric life, reducing methane emissions is one of the best ways to achieve a near-term beneficial impact in mitigating global climate change.” *Landfill Emissions ANPRM*, 79 Fed. Reg. at 41774/1.

WTE is a powerful antidote for landfills’ pernicious GHG impact. As EPA’s solid waste management planning methodology recognizes, WTE reduces landfill GHG emissions in three ways by: (i) generating electricity or steam (or both) without having to use fossil fuels;⁹ (ii) avoiding the potential methane emissions that would result if the same waste was landfilled, and

⁹ The combustion process at all modern WTE facilities produces steam. Most WTE facilities direct their steam to a turbine generator for production of electricity; at other facilities all steam production is routed to direct use (e.g., space heating or use in a manufacturing process) rather than for electric power generation; finally, a third category of WTE facilities use steam for electric power generation and for other manufacturing or industrial needs.

(iii) recovering ferrous and nonferrous metals, which avoids the additional energy consumption that would be required if the metals were produced from virgin ores. *Better to Burn or Bury*, pp. 1711-14; *see also Life After Fresh Kills*, Part B, Summary and pp. B-23 to B-32. Use of EPA's model for determining the life-cycle GHG emissions from alternative MSW management methods shows that for every ton of MSW that is directed to WTE rather than landfilled, between 1.62 and 4.1 tons of GHG emissions are avoided.¹⁰

Consistent with EPA's analysis, the Kyoto Protocol's Clean Development Mechanism approves WTE as a source of tradeable GHG emission reduction credits that displaces electricity from fossil fuels and avoids landfill methane emissions. *Approved Baseline and Monitoring Methodology AM0025*, pp. 1-3, <https://cdm.unfccc.int/UserManagement/FileStorage/-9WVIN7Z06A8UGLFPO4Y51BDMJ23QXT>. In addition, the United Nations' November 2011 report, *Bridging the Emissions Gap*, concludes that waste sector GHG emissions can be reduced by 80% if there is significant diversion of currently landfilled waste to WTE. *See* pp. 37-38.¹¹

¹⁰ *See* <https://archive.epa.gov/epawaste/nonhaz/municipal/web/html/airem.html> (scroll to "Greenhouse Gases") (the information provided at this URL had bipartisan recognition in previous administrations but has been archived by the current administration). The cited URL refers to a 1-ton-avoided metric, which is based on a now-superseded global warming potential (GWP) for methane of 21 times carbon dioxide on a 100-year timescale. Assessment Report 5 (2014) of the Intergovernmental Panel on Climate Change (IPCC), <https://www.ipcc.ch/report/ar5/syr/>, increases methane's GWP to 34 times CO₂ on a 100-year timescale and 86 times CO₂ on a 20-year timescale (GWP is a relative measure of how much heat a particular greenhouse gas traps in the atmosphere relative to the amount of heat trapped by a similar mass of carbon dioxide, the most common greenhouse gas). The corresponding change in the tons-avoided metric (i.e., tons of CO₂-equivalent emissions avoided) as a result of using WTE is 1.62 tons based on a 100-year timescale and 4.1 tons using a 20-year timescale. Given methane's status as a potent short-lived climate pollutant, use of the 20-year timescale GWP of 86 – and the corresponding 4.1 tons-avoided metric – is more accurate. *See Landfill Emissions ANPRM*, *supra*, 79 Fed. Reg. at 41774/1 (referring to "methane's potency as a GHG and its [12-year] atmospheric life"); *see also Proposed Landfill Emission Guidelines*, 80 Fed. Reg. at 52105/1 (same).

¹¹ GHG emissions from WTE are primarily of biogenic origin (approximately two-thirds). *Better to Burn or Bury*, *supra*, p. 1716. These emissions are already part of the natural carbon cycle

C. WTE Encourages Recycling

Finally, WTE is also entirely compatible with recycling. This is evident on a number of bases.

First, WTE communities routinely outperform non-WTE communities in recycling, with recycling rates that are typically well in excess of the national average and in a number of instances lead the nation in recycling. This point is confirmed by a May 2014 national survey. *See* <http://energyrecoverycouncil.org/wp-content/uploads/2016/03/ERC-2014-Berenyi-recycling-study.pdf>. Moreover, although recycling rates are often influenced by state policies that apply equally to WTE and non-WTE communities, WTE communities' recycling rates are typically higher than the overall recycling rates for their respective states. *Id.*, pp. 5, 9-11.¹² It should also be noted that the positive correlation between WTE and higher recycling rates is not unique to the United States; it is also quite evident in other nations.¹³ For these reasons, the Center for American Progress describes the use of WTE, in conjunction with recycling and composting, as “a win-win-win” for the United States. <https://cdn.americanprogress.org/wp-content/uploads/2013/04/EnergyFromWaste-PDF1.pdf>.

because the biogenic carbon that comprises paper, food and other biomass in municipal waste is removed from the atmosphere as part of the plant growth-natural carbon cycle.

¹² The causal connection between the two – recycling and WTE – is the affected community's conscientious approach to waste management, which is reflected in the community's efforts to increase recycling as well as its decision to enhance environmental protection through use of WTE.

¹³ Data for a broad spectrum of European nations shows that the countries with the highest recycling rates also have the greatest reliance on WTE. *See* <http://www.cewep.eu/wp-content/uploads/2019/04/EUROSTAT-MW-data-2017.pdf>. For example, Denmark recycles 46% percent of its municipal waste, processes 53% using WTE, and landfills only about 1%; Germany recycles 68%, uses WTE for 31% and landfills only 1%; similarly, Sweden recycles 47% of its MSW, directs 53% to WTE, and landfills 1%. *See also Europe Finds Clean Energy in Trash, infra, The New York Times*, April 12, 2010 (“Many countries that are expanding waste-to-energy capacity, like Denmark and Germany, typically also have the highest recycling rates”).

CONCLUSION

In sum, Baltimore's Ordinance 18-0306 is at odds with the comprehensive federal-state regulatory system that has governed *amici's* successful development of their WTE facilities. *Amici's* WTE facilities provide significant public benefits as a key component for managing non-recycled MSW, while at the same time providing first-rate protection of the environment, including protection of air quality. Based on the foregoing, as well as for the reasons stated in the Plaintiffs' memorandum in support of their motion for partial summary judgment, *amici curiae* Local Government Coalition for Renewable Energy respectfully request that City of Baltimore Ordinance 18-0306 be declared unlawful and its enforcement permanently enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this 30th day of August, 2019 caused all counsel of record who have consented to electronic service to be served with a copy of the foregoing Brief *Amici Curiae* via the Court's CM/ECF system.

/Benjamin J. Lambiotte

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